



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 200

[Docket No. FR-5850-P-01]

RIN 2502-AJ28

Retrospective Review – Improving the Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs Participants

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise HUD’s regulations for reviewing the previous participation in federal programs of certain participants seeking to take part in multifamily housing and healthcare programs administered by HUD’s Office of Housing. Specifically, the proposed rule would clarify and simplify the process by which HUD reviews the previous participation of participants that have decision-making authority over their projects as one component of HUD’s responsibility to assess financial and operational risk to the projects in these programs. The proposed rule would clarify which individuals and entities will be reviewed, HUD’s purpose in conducting such review, and describe the review to be undertaken. By targeting more closely the individuals and actions that would be subject to prior participation review, HUD not only brings greater certainty and clarity to the process but provides HUD with flexibility as to the necessary previous participation review for entities and individuals that is not possible in a one-size fits all approach. Through this rule, HUD proposes to replace the current previous participation regulations in their entirety.

DATES: Comment Due Date: [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Aaron Hutchinson, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 6178, Washington, DC 20410; telephone number 202-708-3994 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Currently, applicants seeking to participate in HUD's multifamily housing and healthcare programs must certify that all principals involved in a proposed project have acted responsibly and have honored their legal, financial, and contractual obligations in their previous participation in HUD programs, in certain programs administered by the U.S. Department of Agriculture, and in projects assisted or insured by state and local government housing finance agencies. HUD's regulations governing the assessment of previous participation are codified in 24 CFR part 200,

subpart H (Subpart H), and require applicants to complete a very detailed and lengthy certification form (HUD Form 2530).¹

The 2530 form currently requires disclosure of all principals to be involved in the proposed project, a list of projects in which those principals have previously participated or currently participate in, a detailed account of the principals' involvement in the listed project(s), and assurances that the principals have upheld their responsibilities while participating in those programs. The regulations in Subpart H govern not only the content of the certification submitted by applicants, but the types of parties that must certify, the process for submitting the certification, the standards by which submissions are evaluated, and the delegations and duties of HUD officials involved in the evaluation of the certifications. The regulations in Subpart H also contain procedures by which applicants can appeal adverse determinations.

Since the regulations were last revised, with the changing deal structures and transaction practices, it has become apparent that the current regulations are both over-inclusive and under-inclusive, creating unnecessary burdens for participants and HUD alike. For example, the current review and certification process requires submittal of information about the entities' organizational structures and detailed information about each entity in the organizational structure. This information is often duplicative of information that HUD collects elsewhere in program application procedures. The previous participation review process set forth in the current regulations can obfuscate what entities and individuals exercise true control over a project. Applicants are often highly complex entities. Current procedures have not kept step with contemporary organizational structures or transactional practices. For example, the current

¹ See <http://portal.hud.gov/hudportal/documents/huddoc?id=2530.pdf>

regulations' definitions pre-date the development of limited liability companies as an organizational entity.

Participants in HUD's multifamily housing and healthcare programs have long complained about the delays with HUD's previous participation process because of the overly detailed information required to be submitted. Complaints focused on the difficulties associated with obtaining information from all the limited partner investors in individual projects and in duplicating information for multiple levels of affiliates. Current regulations require that HUD field offices send certain requests for determination to HUD headquarters instead of resolving them at the field office level, which contributes to further delays. The process set forth in the current regulations for appealing adverse determinations is cumbersome and yet fails to specify that participants can participate in the appeal or submit information they deem relevant to the appeal. Participants in HUD's multifamily housing and healthcare programs also stated that the previous participation process requires participants to complete a Form 2530 for each project, regardless of the number of Forms 2530 each participant completed in the recent past, regardless of how many projects the participant is involved in each year, and regardless of whether the participant is a well-established, experienced institutional entity already familiar to HUD. Moreover, the Form 2530 is not tailored to any particular program or set of circumstances. Yet, the current regulations require its use for all programs requiring previous participation review.

Over the years, HUD has made efforts to improve the process and minimize the time and collection burden it takes to undergo the previous participation review process. In 1998, a housing re-engineering task force met with members of the multifamily housing industry to

discuss suggestions for improving HUD's previous participation process.² In 2004, HUD convened a working group consisting of multifamily housing industry partners to improve the process.³ In 2004 through 2005, HUD undertook rulemaking to replace the Form 2530 paper submission requirement with an electronic review system, which HUD named the Active Partner Performance System (APPS). HUD published its final rule on April 13, 2005, at 70 FR 19660, which became effective on May 13, 2005, and provided for transition to the new system, six months following publication of the final rule.⁴ Unfortunately, electronic processing did not work as HUD envisioned due to bugs in the now outdated, 2006 version of the electronic system, and the Preservation Approval Process Act of 2007 (Public Law 110-35, approved June 25, 2007) directed HUD to suspend the mandatory electronic filing of previous participations certificates in order to permit paper filings of Form 2530 at the participant's option.⁵

Since 2007, HUD has not undertaken further rulemaking to improve the previous participation process, but has taken incremental steps designed to minimize burden. On January 22, 2010, HUD issued Housing Notice H2010-04, which revised the previous participation process with respect to placing "flags" for certain conditions pertaining to the multifamily housing and healthcare programs process. A flag generally will necessitate additional review by HUD. The 2010-04 notice issued by HUD limited the appropriateness of flags related to failing scores under the Real Estate Assessment Center (REAC) physical inspection process to those situations in which a property has a REAC score below 60 but above 30. Under the notice, such properties are no longer required to be flagged in APPS, but instead the owner of the property is

² See <http://www.hud-consultant.com/2530.html>

³ See <http://www.ncsha.org/node/923>

⁴ See <http://www.gpo.gov/fdsys/pkg/FR-2005-04-13/pdf/05-7351.pdf>

⁵ See <http://www.gpo.gov/fdsys/pkg/PLAW-110publ35/pdf/PLAW-110publ35.pdf>

provided the opportunity to meet with the applicable HUB or Program Center to discuss the identified physical deficiencies, and work out a plan to correct the deficiency or deficiencies.⁶ HUD maintained this process through Housing notices 2011-24⁷ and 2012-16.⁸ On March 6, 2013, HUD posted a fillable portable document form (pdf) version of Form 2530.⁹ In issuing this new form, HUD did make some changes to reduce burden. Schedule A of the form requires a listing of previous projects for only the past 10 years. The form no longer requires alphabetizing the list of the organization's principals, and the organization may attach a significant authority document for principals who have authority to sign on behalf of the organization.

While the guidance provided in the Housing notices and the new Form 2530 PDF with fillable sections have provided some improvement to the previous participation review process, significant improvement is not achieved by solely changing the form by which information is submitted. HUD recognizes that to achieve the improvement that HUD and HUD's multifamily housing and healthcare programs industry partners seek, HUD must change the process. In this regard, HUD is continuing to review its previous participation review practices for potential improvements. These revised regulations are one piece of those continuing efforts.

In soliciting public comment on regulations on which HUD should focus on streamlining and reducing burden, through notice published on March 2, 2011, at 76 FR 11395,¹⁰ commenters

⁶ See <http://www.hud.gov/offices/adm/hudclips/notices/hsg/10hsgnotices.cfm>

⁷ See <http://portal.hud.gov/hudportal/documents/huddoc?id=11-24hsgn.pdf>

⁸ See <http://portal.hud.gov/hudportal/documents/huddoc?id=12-16hsgn.pdf>

⁹ See <http://portal.hud.gov/hudportal/documents/huddoc?id=2530.pdf>

¹⁰ See <http://www.gpo.gov/fdsys/pkg/FR-2011-03-02/pdf/2011-4563.pdf>

raised the regulations governing the previous participation process as regulations that HUD should address as part of the retrospective review process.¹¹

Changes to the regulations governing the previous participation process would benefit both HUD's multifamily housing and healthcare participants and HUD. The detailed prescriptive procedure in the current regulations is at once overly inclusive and under-inclusive, in some instances making it difficult for HUD to review the previous participation of certain controlling entities and individuals with control, while at other times requiring HUD to review the previous participation of entities and individuals that will not exercise control over a proposed project.

II. This Proposed Rule

The proposed rule would revise the Subpart H regulations in their entirety, replacing the current prior participation review process. While the current regulations mandate that Form HUD 2530 be used, the proposed rule would shift the emphasis of the regulations from this specific form to the substance of what is being asked from whom. This would provide HUD with flexibility to develop form(s) specifically tailored to certain programs, which seek information relevant to those programs, and expand electronic data practices for gathering information. This approach would further decrease the burden of information collection imposed on applicants. The proposed revised process would also clarify when past participation review is triggered. Furthermore, the proposed rule streamlines the appeals process for applicants who receive adverse determinations and specifies that they have a right to participate in the appeal and submit information they may feel is helpful in their circumstances.

¹¹ See <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;s=2530%252Bprocess;dct=PS;D=HUD-2011-0037>

Because the instructions of the 2530 form mirror the requirements of the existing regulations, it is assumed that the instructions will need to be revised once the regulations are finalized, following consideration of public comments received in response to this proposed rule. Although the proposed regulations envision greatly reducing the burden of completing the 2530 form, because information will be collected from substantially fewer entities, the substance of the information collected is anticipated to remain largely the same. The information sought by the 2530 form is directed to obtaining core performance information that is needed of an entity that has control over the project. The APPs system will continue to be available for use.

Consolidation of Key Concepts

The proposed rule would consolidate the central concepts currently codified in Subpart H into four regulatory sections. These proposed sections are: § 200.214 (Covered Projects), § 200.216 (Controlling Participants), § 200.218 (Triggering Events), and § 200.220 (Previous Participation).

First, proposed § 200.214 establishes the new term “Covered Project” to refer to the types of proposed projects that subject certain entities and individuals to previous participation review. The definition of Covered Project would include many of the categories of projects currently listed in § 200.217, which describes the types of projects that require principals to submit their previous participation certification. It also includes a category for projects insured under sections 542(b) and 542(c) of the Housing and Community Development Act of 1992 (12 U.S.C. 17107 note), which sections provide HUD with insurance authority independent of the National Housing Act and authorizes certain risk-sharing arrangements with certain entities.

Proposed § 200.216 would identify the individuals and entities that are subject to previous participation review. This concept is currently captured in HUD’s existing codified

regulations in the definition for “Principal” in § 200.215(e) as well as in § 200.218, which sets out who must certify and sign Form 2530. Proposed § 200.216 would establish the new term “Controlling Participant,” in order to clarify that HUD will only seek information pertaining to the previous participation of those individuals or entities who will exercise control over the proposed project. The definition for Controlling Participant would be narrower than the specific types of individuals and entities included in the existing definition for “principal”; instead of including any individuals or entities who have any interest in the project other than an arms-length fee arrangement for professional services. Instead of including long lists of enumerated individuals and affiliate entities, the definition for Controlling Participant would include the persons or entities determined by HUD to have control over the finances or operation of a proposed project. As required by the Preservation Approval Process Act of 2007, investor entities with limited liability in Covered Projects benefiting from low-income housing tax credits, that do not have operational or policy control or influence over a Controlling Participant are all specifically excluded from previous participation review. The proposed regulation would expand this exemption to investors in other kinds of tax credits who also do not exercise control of the project.

Proposed § 200.218 would establish the concept of a “Triggering Event,” which specifically identifies which actions taken by a Controlling Participant would require the submission of materials for the purpose of undergoing previous participant review.

Proposed § 200.220 would describe what is involved in a previous participation review. The purpose of the review is to focus on the prior performance of Covered Projects in which the Controlling Partner exercised actual or constructive control and to determine whether any serious

findings reflect adversely on the Controlling Participants' integrity, competency, or ability to exercise control of a Covered Project responsibly.

In addition, the proposed rule would add the term "Commissioner" to the definitions for Subpart H. The subpart H regulations would be revised to clarify that HUD's decision making authority in the review process resides with the Assistant Secretary for Housing – Federal Housing Commissioner (Commissioner), and the Commissioner's designees.

B. Determining Risk

Under the current regulations, HUD is required to evaluate applicants' prior performance using specific criteria set out in the definition for "risk" in § 200.215 and using the standards for disapproval outlined in § 200.230. HUD has found these criteria and standards to be constraining and, at times, have presented an unnecessarily high bar to participation by qualified applicants. In other instances, HUD has found these criteria and standards to insufficiently cover a circumstance that HUD determines should constitute an impermissible risk to the Department. Nor is previous participation review the primary avenue for the Department to assess the risk of a project; various application and underwriting procedures assess different components of risk. Previous participation review is merely one component of assessing risk, and the proposed rule more accurately reflects its purpose.

Controlling Participants who are debarred, suspended, subject to restrictions under 2 CFR part 2424, or prohibited from doing business with any other federal department or federal agency are automatically precluded from participation in federal programs, and the proposed rule would deny the participation of such Controlling Participants from the current Triggering Event for which they are applying. The proposed rule would also allow the Commissioner to require that other unacceptable risks be mitigated before the Controlling Participant could participate in the

current Triggering Event. Proposed § 200.220(c) would provide the Commissioner this discretion to disapprove an applicant, conditionally accept an applicant, temporarily withhold approval of an applicant until more information can be gathered, or require the Controlling Participant to remedy or mitigate certain conditions to the Commissioner's satisfaction. Examples of unacceptable risk would typically include those deficiencies currently codified at § 200.230, such as but not limited to: (1) mortgage defaults, assignments or foreclosures; (2) suspension or termination of payments under any HUD assistance contract; (3) significant work stoppages; and (4) instances of noncompliance with the regulations, programmatic or contractual requirements of HUD or State or local government's Housing Finance Agency in connection with an insured or assisted project.

Collectively, these changes would significantly reduce the initial paperwork burden for applicants and would allow the Department to undertake a targeted review to those who control the finances and/or operation of a project.

C. Other Proposed Changes

In addition to the proposed regulatory changes discussed above, the proposed rule would make several other streamlining and clarifying changes. For example, § 200.230 of the currently codified regulations requires HUD to consider particular kinds of events or flags in its evaluation of applicants, even when these may not be relevant or indicative of real risk. Any flag is enough to delay a project and can stand as an obstacle to the applicant's participation. The proposed rule refocuses the purpose of this previous participation review. If a violation rises to the level of indicating unacceptable risk, in accordance with contemporary transactional practices, the violation must be mitigated. If not, HUD and the participant have more flexibility in how and when to mitigate the violation. In addition, §§ 200.241-200.245 in the currently codified

regulations establish a detailed appeals process for applicants who receive an adverse determination. The proposed rule would streamline these regulations addressing the appeals process by consolidating them into a single section. Proposed § 200.222 would substitute the opportunity for a hearing before the standing Multifamily Participation Review Committee with the opportunity for reconsideration before a review committee or a reviewing officer, as established by the Commissioner. Further, the proposed rule explicitly provides that the applicant have an opportunity to participate in this reconsideration process and submit information on their behalf; the current regulations lack these provisions.

HUD believes these proposed changes significantly reduce the burden of the previous participation process, which has long been subject to complaints of being too burdensome a process. HUD welcomes comments on how this process may be further streamlined but preserves HUD's right and need to determine the suitability of applicants to participate in HUD's multifamily housing and healthcare programs.

III. Findings and Certifications

Regulatory Review – Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent

permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

This rule was determined not to be a “significant regulatory action” as defined in section 3(f) of Executive Order 12866, nor was it found to be an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order.

This rule responds to the direction of Executive Order 13563 to reduce burden. As discussed in this preamble, HUD stakeholders have long complained about the previous participation process, and HUD has offered measures over the past to improve this process. However these measures were not successful in providing a significant overhaul of the previous participation review process sufficient to remedy the common complaints. HUD believes that this proposal to streamline the previous participation review process strikes the appropriate balance between allowing HUD to effectively assess the suitability of applicants to participate in HUD’s multifamily housing and healthcare programs, while interjecting sufficient flexibility into the process in order to remove a one-size-fits-all review process. Such a balance best allows HUD to make determinations of suitability in order to accurately assess risk.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities.

As has been discussed in this preamble, this rule proposes to greatly streamline HUD’s previous participation review process. As noted earlier in this preamble, and

discussed in more detail in the preceding section, this process has long been the subject of complaint by HUD participants as an overly burdensome process. HUD believes that the changes proposed by this rule would allow HUD to better consider the differences of any applicant and tailor requested information to that applicant, including whether the applicant is a small entity. For these reasons, HUD has determined that this rule would not have a significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

This proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern, or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Federalism Impact

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This rule

does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempts state law within the meaning of the Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Paperwork Reduction Act

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number. The burden of information collection in this proposed rule is estimated as follows:

Information Collection under Current 2530 Review Process

Information Collection	Number of Forms Filed Annually	Approximate No of Respondents Needed to Complete the Form	Burden Hours per Respondent	Total Annual Burden Hours Per Filing	Hourly Cost Per Respondent	Total Annual Cost Per Filing
HUD-2530 (Paper) Electronic	10,000	8 per filing	1 hour per respondent	8	\$20 per respondent	\$160.00
TOTAL ANNUAL BURDEN	10,000	80,000		80,000		\$1.6 Million

PER ALL FILINGS						
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Information Collection under Proposed Participation Review Process

Information Collection	Number of Reviews Done Annually	Approximate No of Respondents to be Reviewed	Burden Hours per Respondent	Total Annual Burden Hours Per Filing	Hourly Cost Per Respondent	Total Annual Cost Per Filing
Previous Participation Review	10,000	3 per filing	1 hour per respondent	3	\$20 per respondent	\$60.00
TOTAL ANNUAL BURDEN PER ALL FILINGS	10,000	30,000		30,000		\$600,000

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the information collection requirements in the proposed rule regarding:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Whether the proposed collection of information enhances the quality, utility, and clarity of the information to be collected; and

(4) Whether the proposed information collection minimizes the burden of the collection of information on those who are to respond; including through the use of appropriate automated

collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Under the provisions of 5 CFR part 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after today's publication date. Therefore, a comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of today's publication. This time frame does not affect the deadline for comments to the agency on the proposed rule, however. Comments must refer to the proposal by name and docket number (FR-5850-P-01) and must be sent to:

HUD Desk Officer

Office of Management and Budget

New Executive Office Building

Washington, D.C. 20503

Fax number: (202) 395-6947

and

Colette Pollard

HUD Reports Liaison Officer

Department of Housing and Urban Development

451 7th Street, S.W., Room 2204

Washington, D.C. 20410

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at

<http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

List of Subjects in 24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Lead poisoning, Loan programs-housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

Accordingly, for the reasons stated in the preamble above, and in accordance with HUD's authority under 42 U.S.C. 3535(d), HUD proposes to amend 24 CFR part 200 as follows

PART 200—INTRODUCTION TO FHA PROGRAMS

1. The authority citation for 24 CFR part 200 continues to read as follows:

Authority: 12 U.S.C. 1702-1715z-21; 42 U.S.C. 3535(d).

2. Revise subpart H to read as follows:

Subpart H –Participation and Compliance Requirements

Sec.

200.210 Policy.

200.212	Definitions.
200.214	Covered Projects
200.216	Controlling Participant.
200.218	Triggering Events.
200.220	Previous Participation review.
200.222	Request for reconsideration.

Subpart H –Participation and Compliance Requirements

§ 200.210 Policy.

It is HUD’s policy that, in accordance with the intent of the National Housing Act (12 U.S.C. 1701 et seq.) and with other applicable federal statutes, participants in HUD’s housing and healthcare programs be responsible individuals and organizations who will honor their legal, financial and contractual obligations. Accordingly, as provided in this subpart, HUD will review the prior participation of Controlling Participants, as defined in § 200.212 and § 200.216, as a prerequisite to participation in HUD’s multifamily housing and healthcare programs listed in § 200.214.

§ 200. 212 Definitions.

As used in this subpart:

Commissioner means the Assistant Secretary for Housing-Federal Housing Commissioner, or the Commissioner’s delegates and designees.

Controlling Participant means an individual or entity serving in a capacity for a Covered Project that makes the individual or entity subject to previous participation review under this subpart, as further described in § 200.216.

Covered Project means a HUD-held, FHA-insured, or HUD-assisted project on which the participation of a Controlling Participant is conditioned on previous participation review under this subpart, as further described in § 200.214.

Previous Participation means a Controlling Participant's previous participation in federal programs, as further described in § 200.220.

Triggering Event means an occurrence in connection with a Covered Project that subjects a Controlling Participant to Previous Participation review under this subpart, as further described in § 200.218.

§ 200.214 Covered Projects.

The following types of multifamily and healthcare projects are Covered Projects subject to the requirements of this subpart, provided however that single family projects are excluded from the definition of Covered Projects:

(a) FHA insured projects. A project financed or which is proposed to be financed with a mortgage insured under the National Housing Act, a project subject to a mortgage held by the Secretary under the National Housing Act, or a project acquired by the Secretary under the National Housing Act.

(b) Housing for the elderly or persons with disabilities. Housing for the elderly financed or to be financed with direct loans or capital advances under section 202 of the Housing Act of 1959, as amended; and housing for persons with disabilities under section 811 of the Cranston-Gonzalez National Affordable Housing Act.

(c) Risk Share projects. A project that is insured under section 542(b) or 542(c) of the Housing and Community Development Act of 1992(12 U.S.C. 17107 note).

(d) Projects subject to continuing HUD requirements. A project that is subject to a Use Agreement or any other continuing HUD requirements or affordability restrictions.

(e) Subsidized projects. Any project in which 20 percent or more of the units now receive or will receive a subsidy in the form of:

(1) Interest reduction payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1);

(2) Rent Supplement payments under section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); or

(3) Project-based housing assistance payment contracts under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), excluding those issued pursuant to section 8(o)(13) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(13)).

§ 200.216 Controlling Participant.

(a) Definition. An individual or entity serving in any of the following capacities for a Covered Project is a Controlling Participant subject to the requirements of this subpart:

(1) An owner of a Covered Project;

(2) A borrower of a loan financing a Covered Project;

(3) A management agent;

(4) An operator (in connection with healthcare projects insured under the following section of the National Housing Act: section 232 (12 U.S.C. 1715w) and section 242 (12 U.S.C. 1715z-7));

(5) A master tenant (in connection with any multifamily housing project insured under the National Housing Act (12 U.S.C. 1701 et seq.), and in connection with certain healthcare projects insured under sections 232 and 242 of the National Housing Act);

(6) A general contractor;

(7) In connection with a hospital project insured under section 242 of the National Housing Act (12 U.S.C. 1715z-7), members of a hospital Board of Directors (or similar body) and executive management (such as the Chief Executive Officer and Chief Financial Officer) that HUD determines to have control over the finances or operation of a Covered Project; and

(8) Any other person or entity determined by HUD to have control over the finances or operation of a Covered Project.

(b) Control of entities. To the extent any Controlling Participant listed in paragraph (a) of this section is an entity, any individual(s) determined by HUD to control the financial or operational decisions of such Controlling Participant shall also be considered Controlling Participants. For purposes of this section, “control” shall mean ownership of at least 25 percent of such entity or the ability to bind such entity in the Triggering Event that necessitates review of Previous Participation.

(c) Exclusions from definition. The following individuals or entities are not Controlling Participants for purposes of this subpart:

(1) Investor entities with limited liability in Covered Projects benefiting from tax credits, including but not limited to low-income housing tax credits pursuant to section 42 of title 26 of the United States Code, whether such investors are syndicators, direct investors or investors in such syndicators and/or investors;

(2) Individuals or entities that do not have operational or policy control or influence over an entity that is a Controlling Participant;

(3) Mortgagees acting in their capacity as such; and

(4) Public housing agencies (PHAs), where the PHA is acting in its capacity as a PHA owning or operating public housing.

§ 200.218 Triggering Events.

Each of the following is a Triggering Event that may subject a Controlling Participant to Previous Participation review under § 200.220:

(a) An application for FHA mortgage insurance, excluding applications already approved by HUD;

(b) An application for funds provided by HUD, such as but not limited to supplemental loans or flexible subsidy loans;

(c) A request to change any Controlling Participant with respect to a Covered Project;

(d) A request for consent to an assignment of a housing assistance payment contract under section 8 of the United States Housing Act of 1937 or of another contract pursuant to which a Controlling Participant will receive funds in connection with a Covered Project;

(e) A bid to purchase a Covered Project or mortgage note held by the Commissioner; or

(f) A sale of a HUD-held mortgage affecting a Covered Project, or a sale of any HUD-held Covered Project that is now or will be subject to a Use Agreement or any other continuing HUD requirements or affordability restrictions. Notwithstanding the foregoing, HUD may elect to refrain from conducting Previous Participation review under this subsection where a bidder's

Previous Participation has already been reviewed under paragraph (e) of this section, in order to avoid a duplicative review.

§ 200.220 Previous Participation review.

(a) Scope of review. (1) Upon the occurrence of a Triggering Event, as provided in § 200.218, the Commissioner shall review the Previous Participation of the relevant Controlling Participants in considering whether to approve the participation of the Controlling Participants in connection with the Triggering Event. The Commissioner's review of a Controlling Participant's previous participation shall include previous financial and operational performance in federal programs that may indicate a financial or operating risk in approving the Controlling Participant's participation in the subject Triggering Event. The Commissioner's review shall consider financial stability; previous performance in accordance with HUD statutes, regulations and program requirements; general business practices and other factors that indicate that the Controlling Participant could not be expected to operate the project in a manner consistent with furthering the Department's purpose of supporting and providing decent, safe and affordable housing for the public. At the Commissioner's discretion, as necessary to determine financial or operating risk, this review may include the Controlling Participant's participation and performance in any federal program and may exclude previous participation in which the Controlling Participant did not exercise, actually or constructively, control.

(2) The Commissioner will not review Previous Participation for interests acquired by inheritance or by court decree.

(3) In connection with the submittal of an application for any Triggering Event, applicants shall identify the Controlling Participants and, to the extent requested by HUD, make available to HUD the Controlling Participant's Previous Participation in Covered Projects.

(b) Results of review. (1) Based upon the review under paragraph (a) of this section, the Commissioner will approve, disapprove, limit, or otherwise condition the continued participation of the Controlling Participant in the Triggering Event, in accordance with paragraphs (c) and (d) of this section.

(2) The Commissioner shall provide notice of the determination to the Controlling Participant including the reasons for disapproval or limitation. The Commissioner may provide notice of the determination to other parties, as well, such the FHA-approved lender in the transaction.

(c) Basis for disapproval. (1) The Commissioner must disapprove a Controlling Participant if the Commissioner determines that the Controlling Participant is suspended, debarred or subject to other restriction under 2 CFR part 2424;

(2) The Commissioner may disapprove a Controlling Participant if the Commissioner determines:

(i) The Controlling Participant is restricted from doing business with any other department or agency of the federal government; or

(ii) The Controlling Participant's record of Previous Participation reveals significant risk to proceeding with the Triggering Event.

(d) Alternatives to disapproval. In lieu of disapproval, the Commissioner may:

(1) Condition or limit the Controlling Participant's participation;

(2) Temporarily withhold issuing a determination in order to gather more necessary information; or

(3) Require the Controlling Participant to remedy or mitigate outstanding violations of HUD requirements to the Commissioner's satisfaction in order to participate in the Triggering Event.

§ 200.222 Request for reconsideration.

(a) Where participation in a Triggering Event has been disapproved, otherwise limited or conditioned because of Previous Participation review, the Controlling Participant may request reconsideration of such determination by a review committee or reviewing officer as established by the Commissioner.

(b) The Controlling Participant shall submit requests for such reconsideration in writing within 30 days of receipt of the Commissioner's notice of the determination under § 200.220.

(c) The review committee or reviewing officer shall schedule a review of such requests for reconsideration. The Controlling Participant shall be provided advance written notification of such a review. The Controlling Participant shall be provided the opportunity to submit such supporting materials as the Controlling Participant desires or as the review committee or reviewing officer requests.

(d) Before making its decision, the review committee or reviewing officer will analyze the reasons for the decision(s) for which reconsideration is being requested, as well as the documents and arguments presented by the Controlling Participant. The review committee or reviewing officer may affirm, modify, or reverse the initial decision. Upon making its decision,

the review committee or reviewing officer will provide written notice of its determination to the Controlling Participant setting forth the reasons for the determination(s).

Date: August 3, 2015

Edward L. Golding,
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